No. 02-448

Supreme Court, U.S.
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In The
Supreme Court of the United States

JEREMY DOUGLAS HILL, LUCAS GALLAGHER, and GEORGE LARRY COURS, as Next Friends of Courtney Cours, a Minor,

Petitioners,

v.

CITY OF FREEPORT, TEXAS, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENT BRAZOSPORT INDEPENDENT SCHOOL DISTRICT'S BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

I. Proceedings Below

Petitioners, Jeremy Douglas Hill and Lucas Gallagher (originally through their parents and guardians), filed this action against the Brazosport Independent School District ("Brazosport ISD") and the City of Freeport, Texas. (Pet. Writ Cert. at 3, fn.1.) Defendant Brazosport ISD filed a motion to dismiss for failure to state a claim. (Pet. Writ Cert. at 3, fn.1.) The City of Freeport also filed a motion to dismiss. (Pet. Writ Cert. at 3, fn.1.)

Petitioners amended their complaint to add George Larry Cours, as next friend of Courtney Cours, and removed Petitioner's guardian/parents as next friends (with Hill and Gallagher asserting their causes of action on their own behalves). (Pet. Writ Cert. at 3.) Brazosport ISD and City of Freeport filed amended answers and motions to dismiss and the District Court granted the motions. (Pet. Writ Cert. App. D.) Petitioners appealed the dismissal to the Fifth Circuit Court of Appeals. Oral argument was heard on March 5, 2002 and the Court of Appeals issued its opinion upholding the District Court on May 20, 2002. (Pet. Writ Cert. App. B.) Petitioners filed a petition for hearing, which was denied on June 17, 2002. (Pet. Writ Cert. App. A.) Petitioners filed the instant Petition for Writ of Certiorari on September 13, 2002.

II. Statement of Relevant Facts[1]

Petitioners were among a group of students who were detained on April 27, 1999, by the City of Freeport Police Department for questioning following receipt of a threatening letter left at their school, Brazosport High School. (Pet. Writ Cert. App. E at E5-E7.) The letter, which threatened school violence, was found by Brazosport High School officials just a few days before the Petitioners were taken into custody. (Pet. Writ Cert. App. E at E7.) Petitioners allege that fellow students identified them and several of their friends as a social clique or group, and thus, when one of group members the Petitioners associated with was suspected of authoring the threatening note, the Petitioners were questioned by Mr. Doug Boone, principal of Brazosport High School, and the City of Freeport Police. (Pet. Writ Cert. App. E at E9.) The Petitioners allege that they were frisked, handcuffed and detained by the City of Freeport Police. (Pet. Writ Cert. App. E at E6.) The Petitioners claim that they were berated by the police and threatened with jail time if they did not cooperate. (Pet. Writ Cert. App. E at E6.) The Petitioners also allege that once they arrived at city hall, they were placed in a courtroom where they and their parents were lectured and yelled at in a hostile tone by the police and Mr. Boone. (Pet. Writ Cert. App. E at E7.) Petitioners were subsequently released to their parents

[1] In light of the 12(b)(6) standard of review, the "facts" described in the Statement of Facts section are simply those *alleged* in the Petitioners' Complaint. Brazosport ISD strongly disputes Petitioners' version of the facts in this case.

and no further action was taken. (Pet. Writ Cert. App. E at E8.)

REASONS FOR DENYING THE WRIT

I.

The Fifth Circuit Court of Appeals Correctly Applied the Supreme Court's Holding in *Vernonia v. Acton* and *Pottawatomie County v. Earls* does not Conflict with the Fifth Circuit's Decision in this Case

A. The Fifth Circuit Court of Appeals Correctly Applied the Fourth Amendment Standard

Petitioners have argued that the Fifth Circuit "grossly misapplied" the holding in *Vernonia v. Acton* in its decision upholding the dismissal of Petitioners' Fourth Amendment violation claims against the Brazosport Independent School District and the City of Freeport, Texas. Petitioners also assert that the "federal courts have recognized that when local law enforcement is involved in investigations of school children for criminal activity, absent exigent circumstances, the same probable cause requirements control police action regardless of whether or not the child is in school or off of school grounds." (Pet. Writ Cert. at 8.) These statements are without merit.

Petitioners further argue that *Picha v. Wielgos*, a 1976 federal district court case, is widely accepted "as the rule of law" regarding searches and seizures of students by law enforcement personnel on school campuses and that the Supreme Court's decision in *New Jersey v. T.L.O.* cites this case for authority. (Pet. Writ Cert. at 8-9.) This statement, too, is without merit. For support, Petitioners site a list of

sixteen cases for the proposition that *Picha* is "the rule of law" on the issue of probable cause and searches of school students. (Pet. Writ Cert. at 9.) At first blush, this list of cases appears impressive. However, examination of the citation string reveals that only two cases even remotely support the proposition for which sixteen cases have been cited.

First, Petitioners cite *New Jersey v. T.L.O.* stating that the Supreme Court did not "extend" its ruling to a search conducted by school officials in conjunction with law enforcement and cited *Picha v. Weilgos* in doing so. (Pet. Writ Cert. at 9.) This statement is misleading in that it avers that the *T.L.O.* decision somehow expressed an opinion on searches done jointly between school personnel and law enforcement and that the Court cited to *Picha* as support. The Supreme Court did not decline to "extend" its ruling in *T.L.O.* to school searches involving law enforcement officials, but rather did not consider this circumstance nor did it express an opinion one way or the other regarding this type of search. The Court also did not cite to *Picha* as support. The Court, in footnote 7, states:

> We here consider only searches carried out by school authorities acting alone and on their own authority. This case does not present the question of the appropriate standard for assessing the legality of searches conducted by school officials in conjunction with or at the behest of law enforcement agencies, and we express no opinion on that question. *Cf. Picha v. Wielgos*, 410 F. Supp. 1214, 1219-1221 (N.D. Ill 1976) (holding probable-cause standard applicable to searches involving police)."

New Jersey v. T.L.O., 469 U.S. 733, 743 n.7 (1985). The *Picha* cite is a "compare" citation only to emphasize that this issue was not raised by the facts of *T.L.O.* and clearly not as support for not "extending" the ruling to include searches including police involvement.

Second, Petitioners cite five Fifth Circuit opinions that allegedly support their proposition that searches involving the police are held to a higher standard. Three of the cases have absolutely nothing to do with searches by school and/or police officials. *See Doe v. Taylor Indep. Sch. Dist.*, 975 F.2d 137 (5th Cir. 1992) (involving due process and equal protection claims by a student sexually molested by a teacher); *Fee v. Hernedon*, 900 F.2d 804 (5th Cir. 1990) (addressing a Section 1983 claim by a special education student for excessive corporal punishment); *Jefferson v. Ysleta Indep. Sch. Dist.*, 817 F.2d 303 (5th Cir. 1987) (examining qualified immunity for alleged due process violations claimed when student was tied to her desk for an entire school day). The remaining two cases cited are inapplicable to the instant case as well. *See Horton v. Goose Creek Indep. Sch. Dist.*, 690 F.2d 470 (5th Cir. 1982) (holding that random use of drug-detection dogs by school officials to inspect a student's person was a search under the Fourth Amendment and required a reasonable suspicion prior to inspection); *Piazzola v. Watkins*, 442 F.2d 284 (5th Cir. 1971) (examining a college regulation allowing school officials and police officers to search dormitory rooms without a warrant or student consent). *Horton* specifically did not address the standard applied when a school official acts in conjunction with local law enforcement, *see Horton*, 690 F.2d at 481 n.19, and the *Piazzola* case simply does not address the applicable

standard for determining the reasonableness of a search on a primary or secondary school campus.

Finally, the majority of the remainder of district court and state court cases cited do not support the proposition that *Picha* is "widely regarded as the rule of law" on the issue of student searches involving local law enforcement. *See, e.g.*, *Bilbrey v. Brown*, 738 F.2d 1462 (9th Cir. 1982) (citing *Piazzola* and *Picha* solely for the proposition that student searches are subject to the Fourth Amendment and does not address searches involving law enforcement); *Cales v. Howell Pub. Schs.*, 635 F. Supp. 454 (E.D. Mich. 1985) (involving qualified immunity claims for school personnel involved in strip search of student and does not address searches involving law enforcement); *Jones v. Latexo Indep. Sch. Dist.*, 499 F. Supp. 223 (E.D. Tex. 1980) (addressing the constitutionality of the use of drug-detection canines in student searches and does not address searches involving law enforcement); *Belliener v. Lund*, 438 F. Supp. 47 (N.D.N.Y. 1977) (addressing reasonableness of strip search conducted by school officials and does not address searches involving law enforcement); *New Mexico v. Tywane H.*, 933 P.2d 251 (N.M. Ct. App. 1997) (suppressing evidence recovered from a student by police officers hired as security guards during an after-school dance sponsored by a private entity); *Kuehn v. Renton Sch. Dist. No. 403*, 694 P.2d 1078 (Wash. 1985) (prohibiting suspicionless searches of students' luggage as a condition to participation in band concert tour and does not address searches involving law enforcement); *M.J. v. Florida*, 399 So.2d 996 (Fla. Dist. Ct. App. 1981) *overruled by Florida v. D.S.*, 685 So.2d 41 (Fla. Dist. Ct. App. 1996) (rejecting the *M.J.* decision and stating that the legality of a search of student – by school officials or otherwise – depends upon

the reasonableness under all circumstances of the search). The two cases that infer that police presence during student searches may invoke a higher Fourth Amendment standard (than a search by school officials alone) are cases from an out-of-state federal district court and state court that were decided prior to *New Jersey v. T.L.O.* and thus, have no precedential value in the Fifth Circuit Court of Appeals and have little, if any, probative value.

Petitioners' allege that the Southern District of Texas and the Fifth Circuit Court of Appeals "disregarded extensive precedent" regarding student searches by school officials and police officers in holding that the special needs exception to the Fourth Amendment applied in the instant case. (Pet. Writ Cert. at 8.) As discussed in detail above, this alleged "extensive precedent" does not support Petitioners' assertions. Furthermore, Petitioners, in their list of cases, fail to cite to the *one* Fifth Circuit case on point in this matter: *Milligan v. City of Slidell*, 226 F.3d 652 (5th Cir. 2000).

In *Milligan*, school officials detained the plaintiffs, a group of high school students believed to be involved in or have knowledge of a scheduled after-school fight. *See Milligan*, 226 F.3d at 653. The vice principal called the students into his office where they were interrogated by police regarding their involvement and/or knowledge of the scheduled fight. *See id.* One of the plaintiffs testified that he felt physically intimidated by the police interrogation and that he did not feel free to leave the interrogation. *See id.* Notably, the Fifth Circuit Court of Appeals, in striking a balance between the competing governmental and individual interests at issue in *Milligan*, did not require the vice principal or the police to act pursuant to probable cause. *See id.* at 655-56. Furthermore, the Fifth

Circuit in *Milligan* overturned the district court decision, which required reasonable suspicion due to the involvement of the police. The Fifth Circuit found that the district court's analysis was "inappropriate" because the case involved the rights of students in a public school setting and that the proper inquiry was directed by *Vernonia School District 47J v. Acton*, 515 U.S. 646 (1995). *See Milligan*, 226 F.3d at 654. Thus, Petitioners' assertion that the Fifth Circuit misapplied the holding in *Vernonia* and disregarded precedent in making its decision is erroneous. As a matter of fact, a finding by the Fifth Circuit that probable cause was required would have ignored the binding precedent of *Milligan*. Petitioners' argument is without merit and the Petition for Certiorari should be denied.

B. The recent decision of *Pottawatomie County v. Earls* does not conflict with the Fifth Circuit's decision below

Petitioners erroneously argue that the Supreme Court decision in *Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls*, 122 S. Ct. 2559 (2002) raises the standard by which the special needs exception to the Fourth Amendment is judged and that the Fifth Circuit Court of Appeals decision below cannot withstand the scrutiny required by *Earls*. (Pet. Writ Cert. at 12.) Petitioners argue that the *Earls* decision, which upheld the right of school officials to randomly drug test students participating in extracurricular activities, was conditioned upon the exclusion of police involvement. (Pet. Writ Cert. at 10-11 (stating that the *Earls* decision extended "the right of school officials, *without the assistance*

or participation of local law enforcement officers, to drug test students")). This is not true.

In determining the reasonableness of the search at issue, the Court in *Earls* examined the character of the intrusion on the students' privacy interests. *See Earls*, 122 S. Ct. at 2566. In examining the intrusiveness of collecting urine samples, the Court examined how the samples were collected and what was done with the samples once obtained. *See id.* at 2566-67. In determining that the "invasion of students' privacy [was] not significant," the Court considered to whom the test results would be disclosed. *See id.* at 2567. The Court found that the decision not to share the test results with local law enforcement militated against the alleged privacy intrusion alleged by the plaintiffs. This was but one factor considered by the Court in balancing the privacy interests of the students against the nature and immediacy of the school's need to provide a safe, drug-free environment. The involvement, or lack thereof, of law enforcement was a factor considered in determining the reasonableness of the search at issue; it was not a prerequisite to the standard to be invoked in determining the legality of the alleged Fourth Amendment violation. Petitioners' argument that *Earls* warrants vacation and remand of the decision below is misplaced and the Petition for Certiorari should be denied.

II.

The Fifth Circuit's Decision Appropriately Considered the "Special Needs Exception" to the Fourth Amendment and This Case Does Not Have Far-Reaching Implications to Warrant Review by the Supreme Court.

Petitioners argue that a fact-specific balancing of the intrusion on privacy versus the government's legitimate interest must be done to determine the reasonableness of a search of a school student. This is true and exactly what the District Court and Fifth Circuit Court of Appeals did in this case. The Fifth Circuit Court of Appeals held that the "district court reasoned that the mere detention of the students for several hours was not sufficient to establish a Fourth Amendment violation in light of the school's custodial and tutelary responsibilities. Under all relevant circumstances herein we are compelled to agree." (Pet. Writ Cert. App. B at B5.)

In conducting the fact-specific balancing, the District Court properly weighed Brazosport Independent School District's tutelary and custodial interests against the Petitioners' privacy interests. (Pet. Writ Cert. App. D at D8-D9); *see also Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 656-657 (1995) (directing courts, in undertaking the Fourth Amendment reasonableness inquiry, to consider a school's custodial and tutelary responsibility for children). The Fifth Circuit recognized this balancing and agreed with the result. (Pet. Writ Cert. App. B.)

In the context of schools, it is well-settled that students have a lesser interest in privacy than the general population and school officials have a substantial, if not a compelling interest, in maintaining order and discipline.

See New Jersey v. T.L.O., 469 U.S. 325, 339 (1985) ("Against the child's privacy interest must be set the substantial interest of teachers and administrators in maintaining discipline in the classroom and on school grounds."). Under the 12(b)(6) standard, the District Court properly assumed that the Petitioners' pleadings alleged a strong interest in being free from "the frisking, handcuffing, and subsequent detention that took place." (Pet. Writ Cert. App. D at D7.) The District Court next turned to the importance of the governmental interests involved. (Pet. Writ Cert. App. D at D9.) In assessing the weight of the school district's interests, the District Court focused on the immediacy of the Brazosport ISD's interests and the efficacy of the means used to address the governmental interest pursuant to the Fifth Circuit decision in *Milligan v. City of Slidell*, 226 F.3d 652 (5th Cir. 2000).

The District Court determined the school district and City of Freeport's interests in detaining and questioning the Petitioners regarding threatened school violence outweighed the Petitioners' privacy interests. The District Court found that "[t]he bottom line is that the rights asserted by Petitioners, although legitimate and substantial, do not outweigh the School's dramatically compelling interests in maintaining a safe place of learning." (Pet. Writ Cert. App. D at D9.) The Fifth Circuit Court of Appeals reviewed this fact-specific balancing and held that "[g]iven the totality of the circumstances surrounding the detention of appellants, we cannot say with the required certainty that the actions of the school officials and police herein were unreasonable." (Pet Writ Cert. App. B at B5.)

The facts, as alleged by the Plaintiffs, support the District Court and the Fifth Circuit's determinations. The Petitioners admit that Brazosport High School officials

found a "purportedly threatening letter" in the High School computer lab several days before the April 27, 1999 incident. (Pet. Writ Cert. App. E at E6-E7.) The Plaintiffs also admit they were among a group of students identified as individuals with possible knowledge of or associates of the student who left the threatening letter. (Pet Writ Cert. App. E at E9.) In a time of increasing school violence throughout the nation, the District Court's determination that a school district's interests in protecting students from indiscriminate school violence outweighs the Plaintiffs privacy interest was indeed appropriate. (Pet. Writ Cert. App. B.)

Although the Petitioners attempt to minimize the importance of the time period within which the incident occurred (seven days after the tragic shootings at Columbine High School) and characterize the responsive behavior of school and law enforcement officials as hysterical (Pet. Writ Cert. at 14), the setting in which this incident occurred is extremely relevant and important.

The Fifth Circuit, in conducting a fact-specific balancing of the competing interests, considered the "totality of the circumstances" and found that the safety of the campus outweighed the Petitioners' Fourth Amendment rights in this "sharply defined setting." (Pet. Writ Cert. App. B at B5.) The Fifth Circuit acknowledged the unique nature of the incident and limited its unpublished holding to the facts of this case. Thus, the argument by Petitioners that the District Court and Fifth Circuit cases in this matter will become authority for police to indiscriminately enter school campuses and seize students is disingenuous. The Fifth Circuit appropriately considered the "special needs

exception" and this case does not have far-reaching consequences and, therefore, the Petition for Certiorari should be denied.

CONCLUSION

For these reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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